ORIGINAL

No. 99-5291

Supreme Court, U.S.
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In The

SUPREME COURT OF THE UNITED STATES

CAREY DEAN MOORE,

Petitioner,

v.

STATE OF NEBRASKA,

Respondent.

BRIEF IN OPPOSITION TO PETITION SEEKING WRIT OF CERTIORARI

Submitted by:

DON STENBERG
Attorney General

J. KIRK BROWN
Counsel of Record
Assistant Attorney General
P.O. Box 98920
Lincoln, Nebraska 68509-8920
Tel: (402) 471-2682

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*** Capital case ***

QUESTIONS PRESENTED

1. Whether a state prisoner's right under the 8th Amendment to be free of cruel and unusual punishment can be violated by the time consumed in affording that prisoner the legal process due under the 4th and 14th Amendments?
2. Whether a state has the right to defend a judgment of conviction rendered by its courts in collateral proceedings brought by a state prisoner seeking to void that judgment?

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STATEMENT OF THE CASE

This is a capital case.

The crimes

The following is taken from the opinion of the Nebraska Supreme Court affirming Moore's original judgments of conviction.

> The defendant did not introduce any evidence during the trial of the case. Therefore, there is no significant conflict on the issue of guilt. The defendant confessed commission of the two killings in taped interrogations by the police, which were introduced in evidence. It is not claimed that these confessions were involuntary.
>
> An outline of the evidence, however, is necessary to a discussion of assignment (4) and in order that we may perform our independent function of determining whether the imposition of this particular death penalty is appropriate under the statutory standards, and to assure the death penalty is not imposed in an arbitrary and capricious manner.
>
> Both of the victims were cabdrivers, and the modus operandi in each case was similar. About August 20, 1979, the defendant purchased the handgun with which the murders were committed. He acquired the gun by purchasing it from a cabdriver who had pawned the gun. The defendant and the seller went together to the pawn shop where the gun was redeemed, the defendant furnishing the money for the redemption and paying the seller an additional $50. The gun was then test-fired.
>
> We now quote from the findings made by the sentencing panel in its order, which findings are fully supported by uncontroverted evidence: "The defendant's own statements, in his confession to Officers O'Donnell and Thompson while in custody at Charles City, Iowa, indicate that these crimes had been in the planning stage for at least a day or two before the Van Ness homicide. Apparently on the evening prior to the Van Ness murder, the defendant had called a number of cabs from a telephone booth somewhere on Farnam Street in the downtown Omaha area to see how quickly each would respond to his call. The defendant then hid somewhere in the vicinity to await each cab's arrival, at which time he checked the cab to determine whether the driver would be a suitable victim, i.e., not too young, since the defendant stated that it was easier for him to shoot an older man rather than a younger man nearer his own age. On the evening of the Van Ness homicide, the defendant's plan was to call one cab at a time from the Smoke Pit restaurant, and, if the driver who responded 'wasn't too old,' the defendant would just not identify himself as the fare for which the cab had been summoned. When Mr. Van Ness arrived at the Smoke Pit on August 22, 1979, the defendant determined that this was the driver who would be robbed and shot because 'he wasn't too young'.
>
> "A similar pattern of events unfolded on August 26, 1979. The defendant went to the Greyhound Bus depot at 18th and Farnam Streets in Omaha that evening, and, when he saw a lone cab with an older driver parked at the taxi stand outside the depot, he got into the cab and directed

the driver to take him to the Benson area. According to the defendant, this particular cab and driver were selected both because there were no other cabs at the taxi stand at the time, thus decreasing the chances of the defendant's being identified, and because the driver was an older man. The defendant then stated that, as previously discussed, he had planned ahead of time to rob and shoot the driver of whichever cab he selected." In his confessions the defendant stated that he killed each of the victims in order that the victim would not be able to identify him as the robber.

The body of Van Ness was found at Dam Site 16 near Omaha on the morning of August 22, 1979. The body of Helgeland was found in his cab in Omaha about 7:30 a.m. on August 27, 1979. The defendant was positively identified as one of two persons getting into the Van Ness cab at the Smoke Pit restaurant in Omaha earlier that morning. The other person was identified as his younger brother. He was positively identified by fishermen as being in the cab at Dam Site 16 before the slaying, when Van Ness asked directions in order to take the defendant to the place at the dam where he wished to go. The gun, identified by expert witnesses as the one used in the two slayings, was found in the defendant's possession in a stolen automobile when the defendant was apprehended in Iowa on August 29, 1979.

State v. Moore, 210 Neb. 457, 316 N.W.2d 33, 36-37 (1982).

The process of conviction, sentencing and review

The petitioner (hereinafter "Moore") seeks a writ of certiorari to a decision of the Nebraska Supreme Court affirming the denial of state postconviction relief in *State v. Moore*, 256 Neb. 553, 591 N.W.2d 86 (1999).

On April 14, 1980, the District Court of Douglas County, Nebraska originally imposed two sentences of death upon Moore.

Moore I

The Nebraska Supreme Court affirmed those convictions and sentences in *State v. Moore*, 210 Neb. 457, 316 N.W.2d 33 (1982), *cert. denied*, 456 U.S. 984 (1982) (hereinafter "*Moore I*").

Moore II

Moore's first attempt to obtain state postconviction relief failed. *State v. Moore*, 217 Neb. 609, 350 N.W.2d 14 (1984) (hereinafter "*Moore II*").

Moore III

Between 1984 and 1992, Moore litigated his first federal habeas corpus proceeding. Moore ultimately obtained federal habeas corpus relief upon a claim that Nebraska's "exceptional depravity" aggravating circumstance, as defined at the time *Moore I* was decided, was unconstitutionally vague. *Moore v. Clarke*, 904 F.2d 1226 (8th Cir. 1990), *reh'g denied*, 951 F.2d 895 (8th Cir. 1991), *cert. denied*, 504 U.S. 930 (1992) (hereinafter "*Moore III*").

Moore IV

As a result of the grant of federal habeas relief, the Nebraska Supreme Court ordered a new penalty phase hearing before the District Court of Douglas County. *State v. Moore*, 243 Neb. 679, 502 N.W.2d 227 (1993) (hereinafter "*Moore IV*").

Moore V

At the conclusion of Moore's new penalty phase proceeding, new sentences of death were imposed and those new sentences were affirmed by the Nebraska Supreme Court upon mandatory direct appeal. *State v. Moore*, 250 Neb. 805, 553 N.W.2d 120 (1996), *cert. denied*, 520 U.S. 1176 (1997) (hereinafter "*Moore V*").

Moore VI

Moore again sought state postconviction relief, this time from the sentences of death affirmed in *Moore V*. Relief was denied by the state trial court, and that denial of relief was affirmed in the decision which is the present focus of our attention, *State v. Moore*, 256 Neb. 553, 591 N.W.2d 86 (1999) (hereafter "*Moore VI*").

ARGUMENT

I.

THIS CASE DOES NOT MEET RULE 10 CRITERIA

A.

Uniformity of results below

There exist no "compelling reasons" for this Court to dedicate finite judicial resources to the resolution of the issue Moore asserts.

As Moore amply demonstrates,[1] both the state and federal courts which have confronted this issue have *uniformly* found the claim asserted here by Moore to be utterly without merit. App. 8-10. For once the federal circuit courts and the highest courts of the states have reached, without exception, the same conclusion upon a question of federal constitutional law. There exists no systemic necessity for this Court to address this issue. There exists no split of authority for this Court to resolve.

B.

The results below are not inconsistent with prior rulings of this Court

Moore does not argue, and we have not discovered, that this groundswell of considered judicial rejection of Moore's theory of relief is in any respect at odds with prior rulings of this Court. Again, the concerns described by Rule 10 are not present.

C.

There exists no reason why this court "should" settle this issue

Moore complains that his theory of relief represents an important question of federal constitutional law that has not been, but should be, resolved by this court. It is not.

First of all, this issue *is* "settled", for all practical purposes. The state and federal courts are uniform in their rejection of Moore's theory of relief. Unless this Court observes that this uniformity of national judicial opinion represents a significant departure from its

[1] Petition, pages 8-10.

prior 8th Amendment jurisprudence, and Moore does not suggest that it does, then no "need" to settle this claim exists.

Second, Moore's theory does not present an "important" question. This issue, as resolved by the lower state and federal courts, is not important to the functioning of our federal constitution nor is it important to the citizens of this country. It is important only to Moore and his homicidal ilk who clutch at any straw, any theory, any opportunity for delay, to avoid an appropriate punishment for their criminal behavior.

Third, this Court had an identical claim before it in *Lackey v. Texas*, 514 U.S. 1045 (1995). No member of the *Lackey* court found the granting of certiorari appropriate at that time. Charles Allen Lackey's case was returned to the lower courts of this nation and Charles Allen Lackey is now dead. This claim has no more merit and is no more worthy of this Court's time and consideration now than it was in 1995.

While Moore argues that the absolutely uniform landslide of judicial opinion rejecting his theory of relief, since this court first declined to consider it in *Lackey*, renders the efforts of the lower state and federal courts "an abject failure."[2] Moore fails to explain how the process has failed. In fact, these intervening years demonstrate that the "laboratory" of the lower courts can work. The lower state and federal courts can produce a uniform answer to a specific question of federal constitutional law. The only "failure" of the lower courts has been a resounding failure to credit Moore's theory of relief. That is a failure which–while significant to Moore–is not significant in federal constitutional terms and therefore need not consume the time of this Court.

[2] Petition, page 11.

II.

MOORE'S THEORY IGNORES THE REALITIES OF AMERICAN JUSTICE

For good or evil, this country is very, very cautious about the imposition of death as a criminal sanction. A good share of that caution has been *dictated* by the rulings of this Court creating a wholly unique expansion of the traditional criminal process due a prisoner when facing a potential penalty of death. Caution consumes time.

Moore argues that such caution ultimately represents a violation of the 8th Amendment. If Moore is correct, then more haste in the resolution of capital cases is not only merited, but constitutionally imperative. Many would applaud that conclusion. However, Moore cannot logically be the beneficiary of that conclusion.

Moore's theory implies that Moore's sentence of death should have been carried out *sooner*. The complained of delay has had but one result: Moore is still *alive*. Moore now complains that because he is *still alive* his rights under the 8th Amendment have been violated. Yet continued *life* was the very goal Moore has so obviously and strenuously pursued through nearly two decades of self-initiated litigation. Now he argues that the very life he has fought to prolong, has been prolonged beyond the tolerance of the 8th Amendment. That is an odd bit of logic. It places the 8th Amendment squarely at odds with the Due Process Clause and state and federal statutes providing numerous opportunities for state prisoners to seek collateral review of their judgments of conviction.

Suffice it to say that when the Nebraska Supreme Court affirmed Moore's original sentences of death in 1982, the State of Nebraska was prepared to enforce those sentences. Thereafter, it was Moore–not the State of Nebraska–who *repeatedly* initiated collateral proceedings in state and federal courts seeking to escape or delay his punishment. Unless this Court is prepared to rule that the State of Nebraska had no right to defend, in the state and federal courts, the criminal judgments imposed upon Moore

when *Moore elected* to challenge them, then no action of the State of Nebraska has prolonged this process for a single minute beyond Moore's first established execution date of August 20, 1982.

Although we believe it to be irrelevant, we note that Moore was not facing a realistic expectation of execution at any time that his sentences of death had been stayed by operation of state statute,[3] state court rule[4] or federal court order.[5] Those periods represent a vast majority of the time consumed by this litigation. Furthermore, for over six years between May 1990, when the federal circuit court affirmed the grant of habeas corpus relief, and September 1996, when Moore's new sentences of death were affirmed by the Nebraska Supreme Court in *Moore V*, Moore was under no valid and enforceable sentence of death whatsoever.[6]

III.

MOORE'S THEORY ATTACKS THE JUDICIAL DELIBERATIVE PROCESS

Moore's theory of relief is in reality an attack upon the state and federal judiciary, not the Executive Branch of the State of Nebraska.

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[3] A sentence of death imposed by a Nebraska trial court is not enforceable until first affirmed by the Nebraska Supreme Court on mandatory direct appeal. Neb. Rev. Stat. § 29-2525 and 29-2528 (1995).

[4] The Nebraska Supreme Court will not grant a request to establish an execution date, and will withdraw any existing warrant of execution, while a death-sentenced prisoner is engaged in state postconviction proceedings. *State v. Ryan*, 252 Neb. 956, 560 N.W.2d 122 (1997).

[5] The federal district court entered a stay of Moore's execution in November 1984, with the filing of his first habeas corpus petition, and that stay remained in place until the grant of habeas corpus relief was affirmed and the mandate returned to the federal district court in May 1992.

[6] See footnote 3, *infra*.

If anything lengthened the time consumed by the legal process afforded Moore in his attacks upon his sentences of death it has been the time consumed by *judicial deliberation*, not the briefing and argument of the State. For example, it took nearly four years for the federal district court to rule upon Moore's habeas corpus petition. The State of Nebraska's appeal of that adverse decision took over three years to be resolved by the federal circuit court.

One may debate whether a court should consume that amount of time in deciding a case, but one cannot rationally argue that a litigant should be held responsible for the time it takes a court to deliberate and resolve a question appropriately brought before it.

IV.

THE STATE'S ARGUMENTS DEFENDING ITS JUDGMENTS OF CONVICTION WERE NOT "NEGLIGENT".

Moore makes much of the language contained in Justice Stevens' memorandum in *Lackey* theorizing that litigation delays "resulting from . . . negligence or deliberate action by the State" may be somehow relevant to this 8th Amendment claim. Justice Stevens did not choose to define the term "deliberate" or the term "negligence" in his memorandum. Moore complains that the State's defense of Moore's judgments of conviction on mandatory direct appeal and before the federal courts in Moore's habeas corpus proceeding represent the type of behavior Justice Stevens would consider to be "deliberate" and "negligent" acts of a state.

Of course, these were "deliberate" acts. They represented a conscious effort by the State to fulfill its legal obligations to the citizens of Nebraska. However, we observe no evil in such action. It lies at the very heart of our cherished adversarial process.

Do these acts represent "negligence"? We think not. The fact that the State ultimately was unsuccessful in defending Moore's original judgments of conviction surely

cannot be the test. If it were, then in every habeas corpus case tried in our federal courts in which relief was ultimately granted, the state would have been "negligent" in arguing the interests of its client. If relevant at all, however, we note that the State's arguments on the vague aggravator issue were found credible by all seven judges of the Nebraska Supreme Court and one of three judges of the federal circuit court panel. See *Moore I*, and *Moore III (Gibson, J., dissenting)*.

We have absolutely no idea what Justice Stevens meant by "negligence" in the *Lackey* memorandum, but we find no evidence of any evil or suspect activities on the part of the State on the record of this litigation–much less anything which could rationally be characterized as "negligence".

The *Lackey* memorandum must be viewed in its appropriate context. Two Justices of this court, who were not moved to dissent from the denial of certiorari in that case, speculated that the issue might prove an interesting one for the lower courts. It didn't

CONCLUSION

The argument that delays in the enforcement of a criminal judgment–occasioned by a prisoner seeking to overturn it, or by the government seeking to defend it–represents cruel and unusual punishment, would be laughable if it were not so sad. If the glory of our system of criminal justice is the myriad levels of "process" we afford a criminal defendant, then it would seem odd indeed to subsequently hold that by affording a prisoner the process due under our state and federal laws and constitutions, we simultaneously violate the very document which commands us to proceed so cautiously.

There is a significant temptation on our part to urge this Court to accept this case and clearly reject Moore's theory of relief so that this claim could be behind us as a nation. However, the issue *is* behind us. No court in this country which has considered this issue

has found it to have merit. Nothing is to be gained by granting the writ prayed for by Moore and what will be lost is the time expended to reject this theory yet again.

There is nothing about this case which approaches the concerns or criteria established by this Court's Rule 10, and we urge that the requested writ of certiorari be denied.

Respectfully submitted,

DON STENBERG
Attorney General

J. KIRK BROWN
Counsel of Record
Assistant Attorney General
P.O. Box 98920
Lincoln, Nebraska 68509-8920
Tel: (402) 471-2682

By: _____
J. KIRK BROWN

CERTIFICATION OF SERVICE

It is hereby certified that two copies of the foregoing Brief in Opposition to Petition for Writ of Certiorari has been served upon Petitioner's counsel of record, Edward F. Fogarty, 1904 Farnam Street, Omaha, NE 68102 and Larry W. Myers, 10808 Prairie Hills Drive, Omaha, NE 68144, by regular United States mail, postage prepaid, on August 9, 1999.

_____
J. Kirk Brown
Assistant Attorney General

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